**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

| | |
|---|---|
| TIM LEE, et al.,<br><br>Charging Parties,<br><br>v.<br><br>PERALTA COMMUNITY COLLEGE DISTRICT,<br><br>Respondent. | Case No. SF-CE-2140-E<br><br>PERB Decision No. 1462<br><br>September 20, 2001 |

Appearances: Timothy Lee, on his own behalf; Crosby, Heafey, Roach & May by Marissa M. Tirona, for Peralta Community College District.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Timothy Lee (Lee) from a Board agent's dismissal (attached) of the unfair practice charge.

The charge alleged that the Peralta Community College District discriminated against Lee in various ways in violation of section 3543.5(a) of the Educational Employment Relations Act (EERA)[1].

[1] EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in pertinent part, that:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or

The Board has reviewed the entire record in this case and finds the dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself, subject to the following brief discussion.

## DISCUSSION

The Board agent correctly found that the statute of limitations period was not tolled for the allegations regarding the May 25, 1999 and July 12, 1999 evaluations. She also correctly found that these allegations are untimely filed and outside the jurisdiction of PERB. Because PERB lacks jurisdiction over these untimely allegations, the Board makes no ruling with respect to the deferability of those allegations.

## ORDER

The unfair practice charge in Case No. SF-CE-2140 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

---

otherwise to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter.

**Dismissal Letter**

February 16, 2001

Hunter Pyle
Siegel & Yee
499 14th St., Suite 220
Oakland, CA 94612

RE: Tim Lee, et al v. Peralta Community College District
Unfair Practice Charge No. SF-CE-2140
Dismissal and Refusal to Issue a Complaint

Dear Mr. Pyle:

In the above-referenced charge Tim Lee (Lee) alleges the Peralta Community College District (District) discriminated against him in violation of the Educational Employment Relations Act (EERA or Act) § 3543.5(a). On December 1, 2000, I issued a warning letter indicating Lee should withdraw or amend this charge by December 8, 2000 because the charge was untimely filed and therefore outside the jurisdiction of PERB. At Lee's request the deadline by which to amend was extended. On December 15, 2000 Lee filed a first amended charge.

The amended charge includes the two allegations from the original charge, and two new allegations. The original charge alleged the District retaliated against Lee by issuing him a negative evaluations dated May 25, 1999, and July 12, 1999. The first amended charge adds the following new allegations: that the District retaliated against Lee by terminating his employment, and refusing to hire him into a new position. This letter addresses all of these allegations. The facts underlying the new allegations are summarized below.

A June 30, 2000 letter by Clinton Hilliard, Vice Chancellor of Administrative Services, notified Lee his assignment had been terminated effective July 31, 2000. On August 25, 2000, Carol Crawford of the Personnel Office informed Lee he was not selected for an Electronics Technician position with the District. Lee alleges the District took these actions in retaliation for his participation in protected activities.

The District and SEIU had a collective bargaining agreement with effective dates of July 1, 1996 through June 30, 2000. The agreement includes a grievance procedure which ends in binding arbitration, and a non-discrimination clause prohibiting the District from retaliating against employees for their participation in protected activities.

The charge does not state a prima facie violation within the jurisdiction of PERB for the reasons that follow.

1. Statute of Limitations

The warning letter summarized the original charge's facts and concluded the charge was untimely filed. The first amended charge alleges there were several inaccuracies in the warning letter, but only one allegation addresses the warning letter's conclusion that the charge is untimely filed. This allegation is addressed below.

The warning letter indicated the statute of limitations period was not tolled while Lee pursued his grievance because the grievance failed to allege the CBA's non-discrimination clause had been violated. Article 3.2 of the CBA states, in pertinent part:

> Furthermore, the District agrees that there shall be no discrimination, interference, restraints or coercion by the District or any of its agents against any of its employees because of membership in the union or exercise of rights to engage in Union activity.

The first amended charge alleges the grievance did refer to the CBA's non-discrimination clause, Article 17.3. Article 17.3 is a part of the CBA's Promotions and Employment Development article and provides:

> The District and its agent or agent shall in no way discriminate against, discourage, obstruct, harass any employee who applies for a vacancy or who participates on any screening committee or on any applicant's behalf as an appointed agent of UPE Local 790.

EERA § 3541.5(a) (1) provides the Public Employment Relations Board shall not, "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." It is your burden, as the charging party to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

Under EERA § 3541.5(a) (2), PERB must consider the limitation period to have been tolled during the time it took the charging party to exhaust any contractual grievance machinery, either by

settlement or binding arbitration. For purposes of calculating statutory tolling, the six-month limitation period begins immediately after the occurrence of the alleged unfair practice and is tolled only during the time used to exhaust the grievance machinery. (State of California (Secretary of State) (1990) PERB Decision No. 812-S.) However, PERB will not toll the statute of limitations in a discrimination case when the District is unaware of the specific discrimination allegation. (North Orange County Community College District (1998) PERB Decision No. 1268.)

As stated in the warning letter, the statute of limitations period for this charge extended back to December 5, 1999. Thus, absent tolling, the original charge's allegations regarding conduct which Lee became aware of on June 29, 1999, and July 12, 1999 where untimely filed. The warning letter noted that Lee failed to allege the District violated the collective bargaining agreement's non-discrimination clause in his grievance and concluded the statute of limitations period was not tolled.

The grievance form included in the original charge cites only articles 5.1 Employees Evaluation Procedures, 17.3 No Discrimination, and 17.4 Employee Training. Article 17.3 indicates the District should not discriminate against individuals applying for vacancies, screening committee members, and employees who act as an appointed agent of UPE Local 790. It does not appear that the Charging Party put the District on notice that he believed the District had retaliated against him for his participation in the PERB process as the grievance does not allege a violation of Article 3.2. Instead, the grievance's reference to Article 17.3 appears to assert the employer discriminated against Lee because he applied for a vacancy. Thus, the statute of limitations period was not tolled and the allegations regarding the May 25, 1999 and July 12, 1999 evaluations are untimely filed and outside the jurisdiction of PERB.

Even if citing to Article 17.3 placed the District on notice, and the statute of limitations was tolled, these allegations do not state a prima facie violation of the EERA within the jurisdiction of PERB for the reasons that follow.

2. Deferral to Arbitration

As stated previously, Lee alleges the District retaliated against him by the following actions: issuing the May 25, 1999, and July 12, 1999 evaluations, terminating his employment on June 30, 2000, and refusing to hire him into a new position on August 25, 2000. The allegations regarding evaluations and Lee's termination are addressed below. The final allegation is addressed in the third section of this letter.

Section 3541.5(a) of the Educational Employment Relations Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b) (5) (Cal. Code of Regs., tit. 8, sec. 32620(b) (5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration. The District and the United Public Employees Local 790 are parties to a collective bargaining agreement which expired on June 30, 2000. Second, the conduct complained of in this charge that the District discriminated against Lee by issuing negative evaluations and terminating his employment is arguably prohibited by Article 3.2 of the CBA.

Accordingly, these allegations must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

3. Refusal to Hire

The final allegation, that the District discriminated against Lee by failing to hire him into a new position fails to state a prima facie violation for the reasons that follow.

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights

under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University, Sacramento (1982) PERB Decision No. 211-H.

Although the time of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.)

On August 25, 2000, Crawford informed Lee that he was not selected to advance to the next phase of the selection process for the positions of Electronics Technician.[1] Taking the facts of his first amended charge as true, Lee was pursuing his grievance to binding arbitration in July 2000.[2] Thus, Crawford's action was close in time to Lee's protected activities. However, the charge fails to demonstrate other factors indicative of nexus. On August 7, 2000, Crawford acknowledged receipt of Lee's application, and indicated that meeting the minimum qualifications for a position does not assure an applicant of an interview. On August 25, 2000, Crawford indicated Lee was not selected to advance in the application process. The charge does not demonstrate that Crawford departed from established procedures. Nor does it appear that Crawford

[1]This conduct occurred following the expiration of the parties' CBA and therefore is not subject to deferral.

[2]The Charging Party provided conflicting facts regarding when the pursuit of his grievance ceased.

provided Lee with an ambiguous or shifting justification for her action. Thus, this allegation must be dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United states mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8 secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service"

must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs. tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Tammy L. Samsel
Regional Attorney

Attachment

**Warning Letter**

December 1, 2000

Hunter Pyle
Siegel & Yee
499 14th St., Suite 220
Oakland, CA 94612

RE: Tim Lee, et al[1] v. Peralta Community College District
Unfair Practice Charge No. SF-CE-2140
Warning Letter

Dear Mr. Pyle:

In the above-referenced charge Tim Lee (Lee) alleges the Peralta Community College District (District) discriminated against him in violation of the Educational Employment Relations Act (EERA or Act) § 3543.5(a) by issuing him a negative evaluation and a written reprimand. My investigation revealed the following information.

Lee was initially employed by the District as a Police Officer. However, when the District's Police Department folded into a local police department, Lee refused employment with the police department and opted to remain employed at the District. Lee's decision required the District to find suitable employment for Lee. After much discussion and an unfair practice charge, Lee was transferred to the Data Processing Center in June 1998. This transfer required Lee to undergo training, as he was not initially qualified for an entry level position in the center.

On May 12, 1999 and May 13, 1999, Lee appeared as a witness in a PERB hearing.[2] Clinton Hilliard, Vice Chancellor of Administrative Services, saw Lee testify.

On May 25, 1999, Lee's first level supervisor, Jeremiah Alip, sent a memorandum to Director of Technology, John Wagstaff, regarding Lee's job performance. Alip evaluated Lee as "Unsatisfactory" in the areas of Job Knowledge, Quality of Work,

[1] Charging Party names himself and unnamed "et als" as parties to this charge. However, no provision in PERB rules allow the filing of a class action unfair practice charge. All parties must be specifically named to be included in the charge. The narrative of this charge pertains only to Lee and will be investigated as such.

[2]The hearing regarded unfair practice charge SF-CE-1929.

Job Effort, Initiative, Cooperation, and Planning and Organizing. On June 29, 1999, Lee received the memorandum. At this time, Wagstaff stated the memorandum was an informal document.

On July 12, 1999, Lee filed a grievance regarding the May 25, 1999, memorandum. Lee alleged the District violated several contractual provisions by issuing the memorandum, which Lee feels is an evaluation. Article 3.2 of the District's collective bargaining agreement prohibits discrimination based on protected activity. Lee's grievance did not allege a violation of Article 3.2.

On July 12, 1999, Lee and his union representative met with Wagstaff. Wagstaff again stated the memorandum was not an evaluation. Additionally, Wagstaff presented Lee with a memorandum entitled "Observations of your work performance." This memorandum laid out six issues Lee must address within the next 30 days.

On July 20, 1999, Lee filed unfair practice charge SF-CE-2071 against the District regarding the memoranda he received. On August 13, 1999, Lee withdrew that charge.

On July 27, 1999, Lee elevated his grievance to Level II. On August 11, 1999, Wagstaff requested to meet with Lee regarding his grievance. However, Lee refused to meet with Wagstaff without his union representative. Lee stated that a meeting was already scheduled for September 10, 1999.

On August 11, 1999, Lee elevated his grievance to Level III. On September 8, 1999, Lee elevated the grievance to Level IV. On September 10, 1999, Lee met with Wagstaff and his union representatives regarding the grievance. Lee appears to be unhappy with SEIU's representation during this meeting, as the union did not raise the issues Lee was most concerned about.

On October 14, 1999, Lee and his union representatives met for a Level IV meeting. During this meeting, the District presented Lee with the opportunity to fill another entry-level position. However, Lee rejected this offer. On October 19, 1999, Vice Chancellor Hilliard sent letters to both Lee and his union representative, Larry Hendel. In this letter, Vice Chancellor Hilliard states that due to Lee's refusal to acknowledge any work performance deficiencies, continued efforts to find Lee another position are fruitless.

On October 26, 1999, Vice Chancellor Hilliard sent Lee another letter denying Lee's grievance. On October 27, 1999, Lee requested SEIU pursue the matter to binding arbitration. On

January 3, 2000, SEIU informed Lee that it would not pursue binding arbitration for his grievance.

The above-stated information fails to state a prima facie violation for the reasons that follow.

EERA § 3541.5(a)(1) provides the Public Employment Relations Board shall not, "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." It is your burden, as the charging party to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

Lee alleges the District discriminated against him by issuing him negative evaluations dated May 25, 1999, and July 12, 1999. Lee first became aware of the May 25, 1999 memorandum on June 29, 1999. Lee filed the instant unfair practice charge on June 5, 2000. The statute of limitations period extends back to December 5, 1999. Thus, Lee's allegations regarding the District's conduct that he became aware of on June 29, 1999, and July 12, 1999 are untimely filed and must be dismissed.

Under EERA § 3541.5(a)(2), PERB must consider the limitation period to have been tolled during the time it took the charging party to exhaust any contractual grievance machinery, either by settlement or binding arbitration. For purposes of calculating statutory tolling, the six-month limitation period begins immediately after the occurrence of the alleged unfair practice and is tolled only during the time used to exhaust the grievance machinery. (State of California (Secretary of State) (1990) PERB Decision No. 812-S.) However, PERB will not toll the statute of limitations in a discrimination case when the District is unaware of the discrimination allegation. (North Orange County Community College District (1998) PERB Decision No. 1268.)

In the instant charge, Lee filed a grievance regarding the May 25, 1999 memorandum. However, Lee failed to allege the District violated the collective bargaining agreement's non-discrimination clause in his grievance. Thus, the statute of limitations cannot be tolled with regard to the May 25, 1999, memorandum, and this allegation must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and

be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before December 8, 2000, I shall dismiss your charge. If you have any questions, please call me at (510) 622-1023.

Sincerely,

Tammy Samsel
Regional Attorney